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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

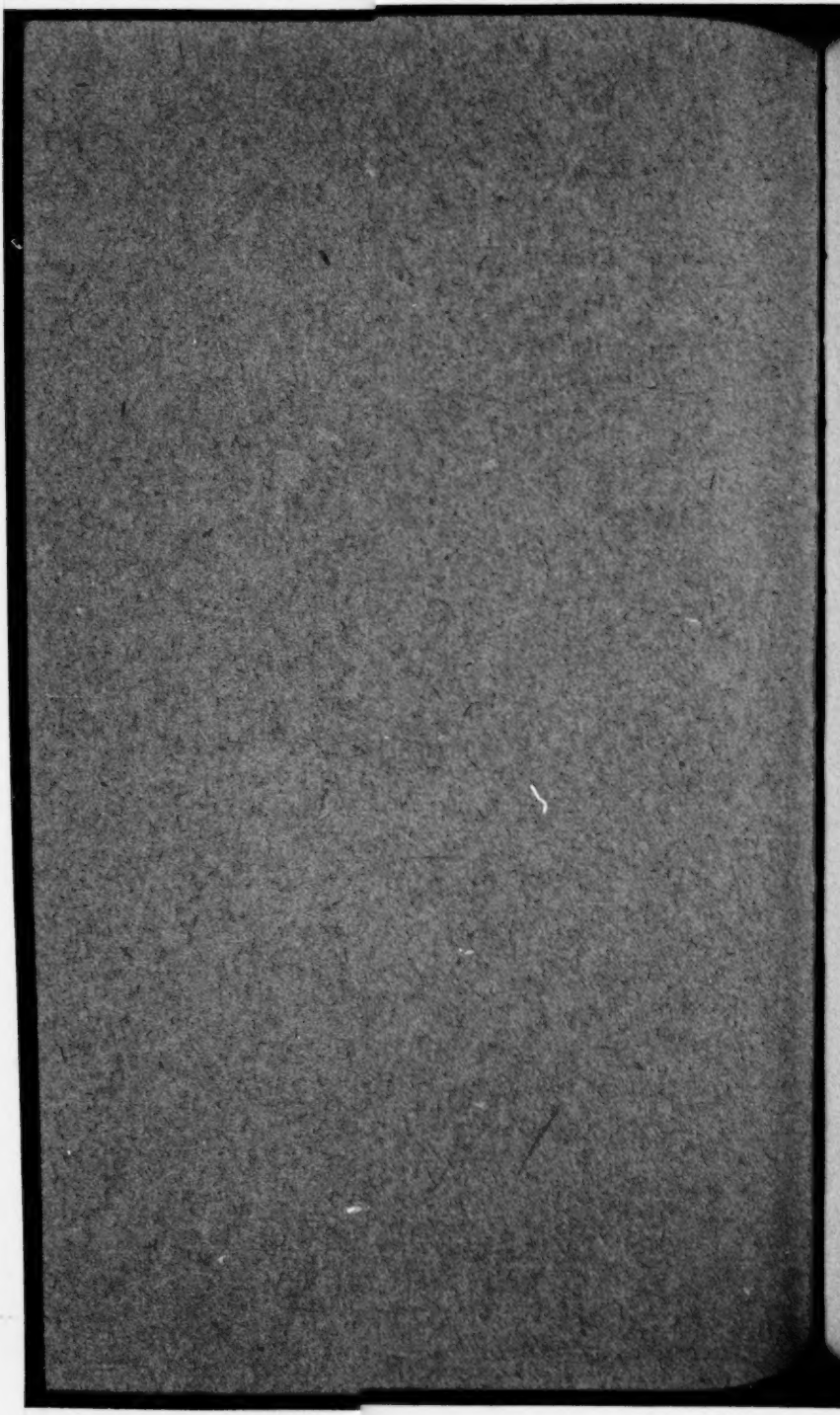
No. 365 - 366

FREDERICK M. FISCH, et al.,
Petitioners,
v.
GENERAL MOTORS CORPORATION,
a Delaware corporation,
and
JOHN D. BATEMAN, et al.,
Petitioners,
v.
FORD MOTOR COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2-3
Statement of the Case	3-5
Reasons Relied Upon for the Allowance of the Writ	5-27
I. The Motion to Dismiss is Premature	5-7
II. The Complaint States a Cause of Action Under Contract Entirely Independent of the Fair Labor Standards Act and the Portal-to-Portal Act	7-9
III. Constitutionality of the Portal-to-Portal Act	9-27
A. Section 2(d) of the Portal-to-Portal Act of 1947, attempting to withdraw jurisdiction of this type of case from the Federal Courts is an unconstitutional usurpation by the Congress of judicial power	9-18
1. Section 2(d) provides a Rule of Decision and not a limitation on jurisdiction of the Courts	9-11
2. Section 2(d) contravenes the constitutional separation of powers	12-18
B. The Act violates the Fifth Amendment by depriving appellants of their property without due process of law	19-27
1. Vested Rights Under Contract	19-21
2. Vested Rights Arising Out of Statutes	21-23
3. The Congressional Finding of an "Emergency" Calling for the use of the Commerce Power Cannot Justify the Total Destruction of the Petitioners' Property Rights	24-27
Conclusion	27-29

INDEX TO AUTHORITIES CITED

	Page
Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680	26
Badger v. Hoidale (C. C. A. 8), 88 F. (2d) 808....	20
Baltimore & Ohio R. R. Co. v. United States, 298 U. S. 349, 80 L. Ed. 1209.....	13
Boehle v. Electro Metallurgical Co., 72 F. Supp. 21	28
Bordens Farm Products v. Baldwin, 293 U. S. 194	7
Bowles v. Willingham, 321 U. S. 503.....	9
Bozant v. Bank of N. Y., 156 F. (2d) 78.....	6
Brinkerhoff-Farris Co. v. Hill, 281 U. S. 673.....	11
Burton v. Zimmerman (C. C. A. 4, 1942), 131 F. (2d) 377	5
Bureau of National Affairs, "Special Analytical Report" PP. 34, 35 and P. 83, 47 Columbia Law Review 1010	18, 28
City of Phoenix v. Drinkwater, 46 Ariz. 470 (1935)	9
Cochran v. St. Paul & Tacoma Lumber Co., 73 F. Supp. 288	28
Cohn v. Cities Service Co., 45 F. (2d) 687.....	6
Cooley, Const. Lim., Vol. 1, p. 190.....	16
Coombes v. Getz, 285 U. S. 434, 76 L. Ed. 866...20,	22, 29
Crabb v. Wilden, (S. D. Iowa, 1946) 65 F. Supp. 369	9
Deaton v. Titusville Bldg. Corp., (S. D. 114, 947) 72 F. Supp. 986	5
DeLoach v. Crowley, (C. C. A. 5, 1942) 128 F. (2d) 278	5
Dioguardi v. Durning, 139 F. (2d) 774.....	6
Duke Power Company v. South Carolina Tax Commission, 81 F. (2d) 513.....	20
Ettor v. City of Tacoma, 228 U. S. 148, 57 L. Ed. 773 20,	22, 29
Ex Parte Watkins, 7 Pet. 568, 8 L. Ed. 786.....	10
Fata v. Healty Co. (N. Y. Ct. of App., 1943) 289 N. Y. 401, 46 N. E. 2d 339 144 A. L. R. 1031....	9

	Page
Filardo v. Foley Bros. 297 N. Y. 217	8
Forbes Pioneer Boat Line v. Everglades Drainage District, 258 U. S. 338, 66 L. Ed. 647	20
General Investment Co. v. New York Central Railroad Company, 271 U. S. 228	10
Gillioz v. Webb, 99 F. (2d) 585	8
Graham v. Goodcell, 282 U. S. 409 at 431	11
Harrison v. Remington Paper Company, 140 F. 385, 390	20
Hawthorne v. Calef, 2 Wall. 10, 17 L. Ed. 776	20
Home Building & Loan Association v. Blaisdell, 290 U. S. 398	24
Hood v. Bell, 84 F. (2d) 136	6
James v. Appel, 192 U. S. 129, 48 L. Ed. 377	13, 29
Kennedy v. Silas Mason Co., 7 W. H. Cases 1022	7
Kilbourn v. Thompson, 13 Otto 168, 26 L. Ed. 377	12, 29
Kline v. Burke Construction Co., 260 U. S. 226	9
Knickerbocker Trust Company v. Myers, 133 F. 764, 767	20
Louisville Bank v. Radford, 295 U. S. 555	25
Lynch v. United States, 292 U. S. 571, 78 L. Ed. 1434	11, 20
McDaniel v. Brown & Root, Inc., (E. D. Okla. 1948) 7 W. H. Cases 981	9
Moore, Supplement to Vol. 1 of Federal Practice, page 265	5
National Surety Corporation v. Wunderlich (C. C. A. 8), 111 F. (2d) 622	20
Nichols v. Collidge, 274 U. S. 531	10
Norman v. B. & O. Railroad, 294 U. S. 240	24
Ochiltree v. Railroad, 21 Wall. 249, 22 L. Ed. 546	20
Ogden v. Blackledge, 2 Cranch, 272, 2 L. Ed. 276	12
Osborne v. Nicholson, 80 U. S. 654, 20 L. Ed. 689	20

Page

Pacific Mail Steamship Company v. Joliffe, 2 Wallace 450, 17 L. Ed. 805.....20, 21, 28
Plunkett v. Abraham Bros. etc., (C. C. A. 6, 1942), 129 F. (2d) 419..... 5
Polk Co. v. Glover, 305 U. S. 5..... 6
Prentis v. Atlantic Coastline Co., 211 U. S. 210, 226, 53 L. Ed. 150, 158..... 13, 29
Pritchard v. Norton, 106 U. S. 124, 27 L. Ed. 104 19
Reynolds v. McArthur, 2 Peters 417, 7 L. Ed. 470.. 12-13
Rogers v. Reynolds, 166 Fed. (2d) 317..... 28
Royalty Service Corp v. Los Angeles, 98 F. (2d) 551 6
Seese v. Bethlehem Steel Company, 168 Fed. 2nd 58 28
St. Joseph Stockyards Co. v. United States, 298 U. S. 38, 80 L. Ed. 1033..... 26
Stover v. Winston Bros., 185 Wash. 416..... 9
Sveltik v. Valtee Aircraft Corp., 16 U. S. Law Week 2161, 7 W. H. Cases 282 (Not officially reported) 28
Treigle v. Acme Homestead Association, 297 U. S. 189, 80 L. Ed. 575..... 20
United States v. General Motors Corporation, 323 U. S. 373, 89 L. Ed. 311..... 29
United States v. Klein, 13 Wallace 128, 20 L. Ed. 519 .....10, 13, 29
United States v. O'Grady's Executors, 89 United States, 641, 22 L. Ed. 772..... 15
Ward Baking Co. v. Holtzoff (C. C. A. 2, 1947), 164 F. 2d 34..... 5, 6
Willoughby, Constitution of the United States 2d ed. 1929, p. 15..... 7

Statutes:

38 A. L. R. 403..... 8
144 A. L. R. 1035..... 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Frederick M. Fisch, et al., and John D. Bateman, et al., petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above cases August 2, 1948.

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 17) are reported in 76 Fed. Sup. 178. The opinion of the Circuit Court of Appeals (R. 35) is reported in 169 Fed. 2nd 266.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 2, 1948 (R. 33). The jurisdiction of the Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. May the complaint as amended in the instant case be dismissed on motion before a hearing on the merits?

2. Does the complaint as amended in the instant case, alleging an independent cause of action, state a claim for relief not barred by the Portal-to-Portal Act of 1947?

3. Does the Portal-to-Portal Act of 1947 violate article III, Section 1 of the Constitution of the United States as an attempt by Congress to exercise judicial power reserved to the courts?

4. Does the Portal-to-Portal Act of 1947 deprive the petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States?

STATUTES INVOLVED

The Portal-to-Portal Act of 1947 (Public Acts 49—80th Congress).

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060) 29 U. S. C. (Sec. 201-219) are as follows:

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

"Sec. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

STATEMENT OF THE CASE

Petitioners seek in this action to recover for unpaid overtime compensation claimed to be due them from the appellee. Their original complaint (R. 2) alleged that appellee was liable to them for unpaid overtime compensation under Section 7, and liquidated damages and attorney fees under Section 16 (b) of the Fair Labor Standards Act of 1938, C. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201 et seq., (hereinafter called the "Act").

Subsequent to the filing of the original complaint, the Portal-to-Portal Act of 1947 (Public Law 49—80th Congress) was adopted. This Act, which purported to relieve all employers from wage liability under the Fair Labor Standards Act of 1938 and to withdraw jurisdiction from the courts to entertain suits to enforce such liability, excepted inter alia activities which were compensated by

> "an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer" (R. 27).

Appellee moved in the court below to dismiss the complaint "for lack of jurisdiction over the subject matter" (R. 10). It contended that the complaint did not allege facts sufficient to bring the employees' claims within the Portal-to-Portal Act of 1947.

Prior to decision on appellee's motion, the petitioners, by permission of the court below, filed an amendment to their complaint.

This amended complaint (R. 12) set forth a distinctly different theory of recovery. It alleged that during the period covered by the complaint there existed a contract or contracts between appellee and the United States under the terms of which appellee obligated itself to pay appellants for overtime work in accordance with the Fair Labor Standards Act of 1938; that said contractual obligation was inserted in said contracts for appellants' benefit, and the obligation having been breached by appellee, appellee was liable upon the contract or contracts for the damages alleged to have resulted to appellants from the breach. Since appellants' claims under this theory arise *out of contract*, and are not predicated upon Section 16 (b) of the Act, no claim was made in the amendment for liquidated damages and attorney's fee.

By order filed March 4, 1948 (R. 28) the district court granted appellee's motion and dismissed appellants' action. The opinion of the court below appears in the record at pages 35 *et seq.*

From this action of the court below appellants have prosecuted this appeal.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I.

THE MOTION TO DISMISS IS PREMATURE

It is familiar law that a pleader is not required to anticipate defenses which might be raised to his pleading and which might remove a cause from the jurisdiction of the court in which the action is brought. Such a defense must be raised by answer and not by a motion to dismiss. See *Ward Baking Co. v. Holtzoff* (C. C. A. 2, 1947), 164 F. 2d 34, applying this rule to suits under the Fair Labor Standards Act subsequent to the Portal-to-Portal Act of 1947. See also *Deaton v. Titusville Bldg. Corp.*, (S. D. 114, 947), 72 F. Supp. 986; and *Moore, Supplement to Vol. 1 of Federal Practice*, page 265.

There can be no question that the complaint was valid when filed several months before the effective date of the new Act. The new Act, like the old, purports to ground jurisdiction upon the existence of *facts* and not upon allegations contained in a complaint. *Burton v. Zimmerman* (C. C. A. 4, 1942), 131 F. (2d) 377; *DeLoach v. Crowley*, (C. C. A. 5, 1942) 128 F. (2d) 278; and *Plunkett v. Abraham Bros. etc.*, (C. C. A. 6, 1942), 129 F. (2d) 419.

In *Bozant v. Bank of N. Y.*, 156 F. (2d) 78, Judge Learned Hand stated, in reversing a summary judgment dismissing a complaint under the Fair Labor Standards Act,:

> "We cannot avoid observing that the case is another mistaken effort to save time by an attempt to dispose of a complicated state of facts on a motion for summary judgment."

See also: *Royalty Service Corp. v. Los Angeles*, 98 F. (2d) 551; *Cohn v. Cities Service Co.*, 45 F. (2d) 687; *Hood v. Bell*, 84 F. (2d) 136; and *Dioguardi v. Durning*, 139 F. (2d) 774.

The constitutionality of an Act of Congress as applied to a specific case should be decided only after full presentation of the facts in issue.

In *Ward Baking Co. v. District Judge*, 164 F. (2d) 34, the Court stated:

> "It is inexpedient to attempt to decide a constitutional question such as this *in vacuo* (an application for writ of mandamus to compel District Judge to dismiss a portal-to-portal action); after the facts respecting the employees' overtime activities have been fully developed, the answer may more clearly appear. See *Borden's Co. v. Baldwin*, 293 U. S. 194, 213."

To the same effect is the decision of the Supreme Court in *Polk Co. v. Glover*, 305 U. S. 5, reversing a decree which overruled a plea of unconstitutionality and granted judgment on the pleadings. The Court said:

> 'The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable."

As stated by Willoughby in his *"Constitution of the United States,"* 2d ed. 1929, p. 15, "The question as to the constitutionality of a law • • • may depend upon the particular facts to which it is sought to be applied."

See also: *Kennedy v. Silas Mason Co.*, 7 W. H. Cases 1022, decided 5/17/48; *Bordens Farm Products v. Baldwin*, 293 U. S. 194.

In the instant case no facts were before the Court below and no facts are before this Court at this time. Even appellee's motion fails to indicate the absence of the jurisdictional facts; it merely alleges the absence of particular words from the complaint. Whether or not the Act applies to the actual facts can not be determined on this motion.

II.

THE COMPLAINT STATES A CAUSE OF ACTION UNDER CONTRACT ENTIRELY INDEPENDENT OF THE FAIR LABOR STANDARDS ACT AND THE PORTAL-TO-PORTAL ACT

Paragraphs XIX to XXIII, inclusive, (R. 13, 14) of the complaint constitute a separate and distinct theory of recovery which is not barred by Section 2 (a) of the Portal-to-Portal Act even without regard to the exceptions therein contained. Indeed, this theory of recovery is neither predicated upon nor is it dependent upon the continuing validity or existence of the Fair Labor Standards Act with or without its amendment by the Portal-to-Portal Act.

The theory of this separate and distinct ground for recovery is the familiar principle of law which recognizes the right of a person for whose benefit a contract is made, to sue upon that contract in the event of a breach resulting in damage to him. The principle, applicable in many

aspects of contract law (see *Annotation in 38 A. L. R.* p. 403), has received general recognition in cases involving suits by employees of public contractors to recover wages as stipulated in the contract between their employer and the public agency. In such cases the contract reference to the statute merely establishes the yardstick measuring the extent of the defaulting employer's liability. The action to recover the contract wage is grounded upon the contract itself and not upon the statute which the contract incorporates by reference.

Appellants' theory that as beneficiaries of the contract or contracts between appellee and the Government, they are entitled to recover *on that contract*, finds support not only in general contract law (see *Annotations at 144 A. L. R.* 1035 and *38 A. L. R.* 403), but in authoritative cases involving the same issue under the Federal Eight-Hour Law and the Federal Davis-Bacon Act.

Filardo v. Foley Bros. 297 N. Y. 217; *Gillioz v. Webb*, 99 F. (2d) 585. In the *Filardo* case the Court stated on page 815:

> "In our view, defendants' promise to 'obey and abide,' was, in effect, a promise to pay their workers such extra compensation for overtime work, and any aggrieved laborer or mechanic may bring suit to enforce that promise as a third party beneficiary."

and the *Gillioz* case holds that:

> "Plainly and specifically authorized by, indeed, taken from the statute, there can be no doubt of the validity and binding force of this provision of the contract, or that, written in as part of the public policy of the United States, to insure the payment of adequate wages on public work, its provisions should be liberally construed to effectuate its purpose."

See also: *Stover v. Winston Bros.*, 185 Wash. 416; *Fata v. Healty Co.* (N. Y. Ct. of App., 1943) 289 N. Y. 401, 46 N. E. 2d 339, 144 A. L. R. 1031; *City of Phoenix v. Drinkwater*, 46 Ariz. 470 (1935); *McDaniel v. Brown & Root, Inc.*, (E. D. Okla. 1948) 7 WH Cases 931; *Crabb v. Wilden*, (S. D. Iowa, 1946) 65 F. Supp. 369.

III.

CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT

A.

Section 2(d) of the Portal-to-Portal Act of 1947, attempting to withdraw jurisdiction of this type of case from the Federal Courts, is an unconstitutional usurpation by the Congress of judicial power

1. Section 2(d) provides a Rule of Decision and not a limitation on jurisdiction of the Courts

It is clear, of course, that the power of Congress to control the jurisdiction of federal courts is "plenary" (*Kline v. Burke Construction Co.* 260 U. S. 226), and that it has similar control over the jurisdiction of state courts with respect to questions arising under federal laws, or in the general area of federal power (*Bowles v. Willingham*, 321 U. S. 503). It is also true that when this control over jurisdiction is exercised in a proper and constitutional manner, "all pending cases, though cognizable when commenced, must fall." (*Kline v. Burke Construction Co., supra.)*

It is equally clear, however, that Congress may not use the device and subterfuge of "jurisdictional control" to accomplish substantive action which is beyond its power:

> "Under the mere guise of realizing something within its powers, Congress may not lay a charge upon what is beyond them."
>
> *Nichols v. Collidge*, 274 U. S. 531.

In order to determine whether Sec. 2 (d) can be sustained as a legitimate exercise of congressional authority over the jurisdiction of state and federal courts, we thus must first determine the exact meaning of the term "jurisdiction," as used in the decisions of the Supreme Court on this subject. The most useful definition of this term is found in *General Investment Co. v. New York Central Railroad Company*, 271 U. S. 228:

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the varirous elements which enter into or qualify the plaintiff's right to the relief sought."

An earlier case, *Ex Parte Watkins*, 7 Pet. 568, 8 L. Ed. 786 clarifies this concept:

> "But the jurisdiction of the Court can never depend upon its decision upon the merits of the case brought before it but upon its right to hear and decide it at all."

When Sec. 2 (d) is analyzed in terms of these definitions, it will readily be seen that what is here attempted by the Congress is not actual control over jurisdiction, but the destruction of certain substantive rights; in other words, what is set up is a rule of decision on the merits of an existing case, since the denial of jurisdiction is limited to the cases specifically and factually described in Secs. 2 (a) and 2 (b). *United States v. Klein*, 13 Wallace 128, 20 L. Ed. 519.

In *Graham v. Goodcell,* 282 U. S. 409 at 431, Chief Justice Hughes wrote:

> "If the Congress did not have the authority to deal by a curative statute with the taxpayer's asserted substantive right in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayer all remedy both as against the U. S. and also as against the one who committed the wrong."

Judge Brandeis stated, in *Brinkerhoff-Farris Co. v. Hill,* 281 U. S. 673:

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

The general rule with respect to the power of Congress or a state legislature to interfere with substantive rights through the device of remedial legislation is stated in *Lynch v. U. S.,* 292 U. S. 571:

> "Contracts between individuals are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened."

Here the right to enforce appellants' claim under the Fair Labor Standards Act of 1938 is not "materially lessened;" it is entirely destroyed by the Portal Act. *We confidently assert that no case in the Supreme Court can be found approving the total destruction of remedies, through the device of jurisdictional control or otherwise, where Congress or the state legislature lacked power to destroy the right involved by direct enactment.*

2. Section 2(d) contravenes the constitutional separation of powers

"All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives" (*United States Constitution,* Article I, Sec. 1.).

"The executive power shall be vested in a President of the United States of America." (*United States Constitution,* Article II, Sec. 1.)

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." (*United States Constitution,* Article III, Sec. 1.)

The principle of the separation of powers enunciated in these phrases of the Constitution, the endowment of Congress with exclusive legislative power, of the President with exclusive executive power, of the Courts with exclusive judicial power, the prohibition against the encroachment of one branch upon the sphere reserved for each of the others are the very heart and core of our constitutional system. (*Kilbourn v. Thompson,* 13 Otto 168, 26 L. Ed. 377.)

The Supreme Court of the United States has given more than lip service to this fundamental doctrine. It has affirmatively recognized its prerogative—nay, its solemn duty—to enforce the separation of powers promulgated by those who wrote our Constitution.

It has unhesitatingly struck down attempts on the part of the legislature to invade the judicial domain, to exercise power specifically forbidden to it by our basic law. *Kilbourn v. Thompson, supra; Ogden v. Blackledge,* 2 Cranch, 272, 2 L. Ed. 276; *Reynolds v. McArthur,* 2 Peters

417, 7 L. Ed. 470; *United States v. Klein,* 13 Wall. 128, 20 L. Ed. 519; *Baltimore & Ohio R. R. Co. v. United States,* 298 U. S. 349, 80 L. Ed. 1209.

And for the same reason those provisions of the Portal-to-Portal Act of 1947 which purport to destroy the present cause of action must likewise be struck down. In changing those provisions, Congress has unquestionably yielded to "those powerful and growing temptations * * * to overstep the just boundaries of [its] own department and enter upon the domain of the others." *Kilbourn v. Thompson, supra.*

Justice Holmes, in two opinions characterized by his usual incisiveness, epitomized the basic distinction between the judicial and legislative power. First, in upholding a statute against an attack that it represented a legislative invasion of the judicial domain, he said:

> "The statute did not deal with the past or purport to grant or refuse a new trial in a case or cases then pending, but performed the proper legislative function of laying down a rule for the future in a matter as to which it had authority to lay down rules." (*James v. Appel,* 192 U. S. 129, 48 L. ed. 377.)

Then in *Prentis v. Atlantic Coastline Co.,* 211 U. S. 210, 226, 53 L. Ed. 150, 158, he stated his conclusion in the following terms:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. This is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."

Whatever might be said of the portions of the Portal-to-Portal Act which prescribe rules for the future, its provisions for retroactive operations—the provisions with which we are concerned here—fall clearly under the head of "judicial action" as thus defined. These provisions "*declare liabilities * * * on present or past facts;*" they say "what the law is"—and what the law was as to liability long before they were in effect; they determine the sum payable to plaintiffs by defendant under the employment relationship in existence prior to their adoption. These provisions operate in precisely the sphere in which the Courts can take—and have taken—action.

Employers had for some years after the adoption of the Fair Labor Standards Act of 1938 sought to exclude a portion of the time worked by employees from the scope of compensable working time under the terms of that Act. The administrator of the Wages and Hours Division and the Court consistently refused to adopt the principles for which these employers contended. And ultimately, in a series of three decisions, *Tennessee Coal & Iron Co. v. Muscoda Local 123, supra; Jewell Ridge Coal Corp. v. Local 6167, United Mine Workers of America, supra; Anderson v. Mt. Clemens Pottery Co., supra,* the Supreme Court of the United States sustained the interpretation which had theretofore been given to the Act and held that all time worked should be compensable time.

In doing so, the Court was, of course, exercising its normal judicial function of construing and enforcing the rights and liabilities of parties under existing law. And, as we have seen, its decision in such a case is "final, and binding upon all other departments of that government and upon the people themselves until they see fit to change their Constitution." *Webster v. Cooper, supra.*

But the 80th Congress chose to declare that that decision was not to be "final and binding." It thus chose to declare that the liabilities enunciated by the Supreme Court should not be enforced. It was in order to avoid the normal and proper effect of the Court's determinations in pending cases that Congress avowedly adopted the Portal-to-Portal Act.

As the Court pointed out in *Kilbourn v. Thompson, supra,* the judicial and legislative functions cannot be identical if the doctrine of the separation of powers is to have any meaning. If the Court was exercising a judicial function in determining whether or not employers were under an obligation to pay employees for the expenditure of their time and energy in such ways as the complaint in this case details, then obviously, the Legislature could not perform that function as well. Either the determination of these liabilities is judicial or it is legislative. If it is legislative then the Court never had the power to render its decisions in these cases at all. And if it is judicial then the Legislature has no authority to alter the determination of the Court.

But there is no doubt that the Court, in making its decisions in the cases referred to, was investigating, declaring and enforcing liabilities as they stood on present or past facts and under laws supposed already to exist. And it is equally clear that Congress has presumed to change those decisions, to nullify them, to interfere with the declaration and enforcement by the Court of liabilities as they stand on present or past facts. It was said in *United States v. O'Grady's Executors,* 89 United States 641, 22 L. Ed. 772:

> "Judicial jurisdiction implies the power to hear and determine a cause, and, inasmuch as the Constitution does not contemplate that there shall be

> more than one Supreme Court, it is quite clear that Congress cannot subject the judgments of the Supreme Court to re-examination and revision of any other tribunal or any other department of the Government."

And again Cooley, at page 190, Volume 1 of his *Constitutional Limitations,* states the rule as follows:

> "But the legislative action cannot be made to retroact upon past controversies and to reverse decisions which the court, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, for the legislature would in fact act as a court of review to which parties might appeal when dissatisfied with the rulings of the court."

We now invite the Court's attention to an even more specific vice of the Portal-to-Portal Act with respect to its usurpation of judicial power. We refer to the distinction made between existing and future claims. It can be demonstrated beyond argument that the Court would have jurisdiction of the claims stated in the present complaint, even under the Portal-to-Portal Act, if the liability asserted had arisen after the passage of the legislation. In other words, under the rule of decision enacted by Congress, particular cases are singled out for discrimination and the rights involved are utterly destroyed (i.e., those arising before enactment), while identical claims arising after enactment are preserved intact. Congress has thus constituted itself judge and jury in disposing of these particular claims, in the plainest possible violation of Article 1, Sec. 3, of the Constitution.

To elucidate this discrimination, we turn first to Sec. 2 of the Portal Act which bans all existing claims which

are not based upon either "an express provision of a written or unwritten contract" (Sec. 2(a) 1), or upon "a custom or practice in effect at the time of such activity," (Sec. 2(a) 2).

On the other hand, Sec. 4, which deals with future claims, does not require any such provision of contract or custom as a condition precedent to liability, but permits recovery for all activities except those "preliminary to or postliminary to said principal activity or activities." The meaning of this distinction is clarified both in the congressional debates and in President Truman's message approving the Act, Senator Cooper, who managed the bill made the following statement with respect to past claims:

> "I have explained that the reason for this is that *in order definitely and surely to relieve against past claims, a stricter rule was adopted.*" (Italics ours.)

He was then asked by Senator Ellender:

> "Was not virtually the same rule adopted as to future claims"?

To which he answered:

> "I think not."

He then proceeded to point out the obvious fact that all "principal activity," as that term might be defined by the administrator of the Act, or by the courts, would be compensable in the future regardless of contract or custom, while such activity could not be used to sustain a past claim unless it had been the subject to a specific contract or custom.

The congressional debates make it clear that such activities, as changing clothes and preparing machines, when required by the nature of the work, constitute "principal activity" and are compensable in the future regardless of contract or custom. The Senate committee report gives as an example of "principal activity" the oiling and cleaning of machinery before commencing work. In the debates on the floor, Senator Cooper, in reply to a question by Senator McGrath, specifically stated that time required for changing clothes and bathing in a chemical factory would be considered a part of "principal activity." (See *Special Analytical Report* issued by the Bureau of National Affairs, pgs. 34 and 35).

It is thus abundantly clear that the very activities detailed in paragraph "XI" of the complaint, for which recovery is sought in the present actions, are in fact "principal activity" for which recovery would necessarily be allowed if the work had been done after May 14, 1947, the date of approval of the Act. This discrimination between identical cases, and decision of particular cases, is purely and exclusively a judicial function reserved to the court, as is shown by the quotations above.

On the basis of these authorities, it is respectfully submitted that the Portal-to-Portal Act must be held invalid as an attempted exercise of judicial power by the legislative branch of the government.

B.

The Act violates the Fifth Amendment by depriving appellants of their property without due process of law

> **"The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of vested rights." (Chief Justice Marshall in Marbury v. Madison, 1 Cranch, 137, 163.)**

1. Vested Rights Under Contract

Appellee's motion to dismiss is addressed to the complaint as amended. The amended complaint, as herein pointed out, alleges two independent theories upon which appellants are entitled to recover. The first theory is in reliance upon appellants' *statutory* rights under the Fair Labor Standards Act of 1938. The second relies upon appellants' *contract* rights as third party beneficiaries under appellee's contract with the Government.

The Fifth Amendment to the Constitution provides that the Federal Government may not deprive an individual of his property "without due process of law." It is well settled that "a vested cause of action is property and is protected from arbitrary interference." *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104.

No proposition has been more firmly established in our jurisprudence than that under the American constitutional system a Legislature cannot take what belongs to one man and arbitrarily give it over to another, cannot appropriate the property of any individual in the United States for the use of the Government without the payment of just compensation therefor, cannot reach into the past to upset transactions already completed and nullify rights already vested in accordance with law. The courts

have unhesitatingly struck down attempted invasion of vested rights, attempted destruction by the Legislature of causes of action already accrued. And they have done so even where national policy and the immediate equities were on the side of the invading legislation. *Forbes Pioneer Boat Line v. Everglades Drainage District,* 258 U. S. 338, 66 L. ed. 647; *Osborne v. Nicholson,* 80 U. S. 654, 20 L. ed. 689; *Steamship Co. v. Joliffe,* 2 Wall. 450; *Hawthorne v. Calef,* 2 Wall. 10, 17 L. ed. 776; *Ochiltree v. Railroad,* 21 Wall. 249, 22 L. ed. 546; *Ettor v. City of Tacoma,* 228 U. S. 148, 57 L. ed. 773; *Coombes v. Getz,* 285 U. S. 434, 76 L. ed. 866; *Lynch v. United States,* 292 U. S. 571, 78 L. ed. 1434; *Treigle v. Acme Homestead Association,* 297 U. S. 189, 80 L. ed. 575; *Duke Power Company v. South Carolina Tax Commission,* 81 F. (2d) 513; *National Surety Corporation v. Wunderlich* (C. C. A. 8), 111 F. (2d) 622; *Badger v. Hoidale* (C. C. A. 8), 88 F. (2d) 808; *Harrison v. Remington Paper Company,* 140 F. 385, 390; *Knickerbocker Trust Company v. Myers,* 133 F. 764, 767.

Thus, in *Osborne v. Nicholson,* 80 U. S. 654, 20 L. ed. 689, it is said that:

> "Rights *acquired by* a deed, will or contract of marriage, or other contract executed *according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in force.* This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood of intolerable evils." (Italics added.)

So insistent was the Court upon adherence to this doctrine that it refused to interpret even the Thirteenth Amendment as having the effect of divesting the seller of his right to the purchase price of a slave in the absence

of a specific provision to that effect in the amendment, and it declined to permit its antipathy for the institution of slavery to govern its judgment as to the propriety of the legislative action thus taken.

2. Vested Rights Arising Out of Statutes

During the congressional debates accompanying the passage of the Portal-to-Portal Act, it appears to have been conceded that vested contractual rights could not be taken away by subsequent enactments. It seems obvious therefore that the Portal-to-Portal Act, with its express exception of "contract" rights, cannot be constitutionally construed so as to deprive appellants of their rights as third party beneficiaries under appellee's contract with the Government.

In *Pacific Steamship Company v. Joliffe*, 2 Wallace 450, the court considered a California statute which provided that a pilot was entitled to half pilotage fees when, under certain circumstances, he had offered his services to a vessel and those services had been refused. Pending a suit for recovery of the compensation *due under the statute*, the legislature repealed the statute. In permitting the recovery, as against the argument that the original right was defeasible because "statutory" in origin, the court said:

> "The claim of half pilotage fees, it is true, was given by the statute, but only in consideration of services tendered * * * If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute, but the transaction is not less a contract on that account."

It will be obvious that there is a perfect analogy between the *Joliffe* case and the present case: In both

cases recovery was sought for compensation fixed by the terms of a statute which was repealed while an action to recover was pending. In both cases it might well be argued that no right of recovery could exist without the statute. In fact, the present case is stronger than the *Joliffe* case, because here the services were not merely tendered, but actually performed.

In *Ettor v. City of Tacoma,* 228 U. S. 148, an action had been brought under the terms of a state statute which required compensation from a municipality for damage to the plaintiff's property, resulting from street grading. Before judgment, the statute was repealed, and the suit was then dismissed. In reversing the judgment of dismissal, the Supreme Court said:

> "The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

The latest case in the Supreme Court to apply this doctrine was *Coombes v. Getz,* 285 U. S. 434. A provision of the California state constitution created a liability on the part of directors of corporations to creditors for all moneys misappropriated by corporate officers. During the pendency of a suit to recover on this statutory liabil-

ity, the section making the directors liable was repealed. In the absence of such a section, there was no liability at common law. Upon appeal to the United States Supreme Court the creditors were permitted to recover. We quote from the opinion:

> "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter denied its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end of the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right) to enforce his cause upon the contract.
>
> Here both parties acted. The creditor extended credit to the corporation; and his action in so doing under the state constitutional provision brought into force for his benefit the constitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eyes of the law, created against himself a contractual liability in the nature of a suretyship."

3. The congressional finding of an "emergency" calling for the use of the commerce power cannot justify the total destruction of the petitioners' property rights

From time to time, the Supreme Court has approved legislation under the so-called "emergency doctrine," i.e. on the theory that in times of national emergency, the power of Congress may be extended to an extent reasonably necessary to meet such emergency. The doctrine proceeds on the assumption that while an emergency can never create a power which theretofore did not exist, the existence of an emergency may justify the exercise of power which might otherwise be unreasonable and therefore illegal.

Home Building & Loan Association v. Blaisdell, 290 U. S. 398.

This doctrine is subject to the following reservations:

(1) There must be a genuine emergency within the general powers of Congress to meet by legislation.

(2) The legislative means taken to meet the emergency must be reasonable and non-discriminatory.

(3) Rights and remedies may be *impaired* to some extent when such impairment is required by the emergency, but if rights are *totally destroyed,* the government must compensate the owners of these rights.

Typical of the "emergency" cases was *Norman v. B. & O. Railroad,* 294 U. S. 240, the so-called "gold clause" case which is cited in the *Seese* opinion. Here it was held that legislation forbidding payment in gold was within the general power of Congress because of its control over the monetary system; that the international financial

emergency justified such a restriction with respect to the unpaid portion of gold bonds; and that the substitution of paper payment for gold payment *only altered and did not destroy,* the rights of the bondholders.

It will be readily seen that the present case is totally dissimilar to the gold clause case. Concededly, the Portal-to-Portal Act is valid with respect to employment after its date, just as the gold legislation was held valid with respect to payments coming due in the future. Future activities under continuing contracts within the general area of congressional control have, as the court pointed out, a "congenital infirmity," i.e. they are subject to change with respect to the unexecuted portion. If this were not so, the effect "would be to place to this extent the regulation of interstate commerce in the hands of private individuals."

Again, in the present case the rights of the appellants are not simply impaired; they are totally and irrevocably destroyed. When this is done even for a public purpose, the Fifth Amendment requires that compensation be paid (*Louisville Bank v. Radford,* 295 U. S. 555).

For the reasons stated, we submit that the Portal-to-Portal legislation will not pass the judicial inquiry which must always be made, both as to the existence of the emergency and the reasonableness of the means chosen to meet it.

> "When the legislature acts directly, its action is subject to judicial scrutiny and determination in these (constitutional) limits of power. The legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to

the end that the Constitution as the supreme law of the land may be maintained."

St. Joseph Stockyards Co. v. United States, 298 U. S. 38, 80 L. Ed. 1033.

When such a scrutiny is made here, it is abundantly clear in the first place that no emergency in fact existed. In the very case which aroused the interest of Congress (*Anderson v. Mt. Clemens Pottery Co.,* 328 U. S. 680), the Court was careful to point out that the facts and liabilities of each particular case should be determined in the light of the familiar *de minimis* rule. Following that opinion, and before the passage of the Act, the trial court in the same case had followed this rule and dismissed the particular case entirely. It is certain, therefore, that no "wholly unexpected liabilities, immense in amount," would "bring about financial ruin of many employers."

Moreover, it is entirely clear that not even Congress believed these dire forebodings. Here is a strange emergency indeed—an emergency so acute that Congress in one and the same statute expressly authorizes the maintenance in the future of causes of action identical with those accruing in the past which, it is claimed, must be banned in order to save industry from financial ruin.

By the same token, it must be clear that the means selected by Congress are unreasonable and illegal as a matter of law, even if the Court should find justification for the declaration of an emergency. As is pointed out in the *Radford* case, if vested rights are to be destroyed for the benefit of the public, the public must pay compensation. Here, beyond any doubt, such rights are sought to be abolished entirely, and all remedy for their enforcement is claimed to have been taken away. At the same time, identical rights in the future are approved and validated.

We believe it clear from the authorities cited above that the present case is controlled squarely by the doctrine established in a long line of Supreme Court decisions protecting vested property rights against retroactive legislative interference. Individually these are small claims, and it may well be that when the *de minimis* rule is applied, the total liability will not be large; they are nonetheless entitled to that equal protection of the law which is the most characteristic and prized feature of our free government—a government of laws and not of men.

The Congress that passed the Portal-to-Portal Act of 1947, and the interests which now urge the courts to ratify such legislative destruction of rights, are shortsighted indeed. The doctrine for which they contend today may tomorrow be invoked in violation of their own more extensive property rights. If the 80th Congress may, by the Portal-to-Portal Act, constitutionally strike down the just claims of these appellants, no power on earth exists to prevent the next Congress from repealing the Portal Act and thus reinstating these claims—or a substantial portion of them.

CONCLUSION

1. The Circuit Court of Appeals, in holding the Portal-to-Portal Act of 1947 constitutional, has decided an important and substantial Federal question which has not been, but should be settled by this court.

The question of the constitutionality of this legislation has been inherent and notorious since it was first proposed. At one point, alternative provisions were included in the Senate Bill, to take effect if the preferred version should be held invalid.

See: Bureau of National Affairs, "Special Analytical Report" Pg. 83, 47 Columbia Law Review 1010.

Since its validity has been under attack in the courts, many doubts have been expressed as to the propriety and constitutionality of the Act.

See: *Cochran v. St. Paul & Tacoma Lumber Co.*, 73 F. Supp. 288.

Boehle v. Electro Metallurgical Co., 72 F. Supp. 21.

Sveltik v. Vultee Aircraft Corp., 16 U. S. Law Week 2161, 7 W. H. Cases 282 (Not officially reported).

Finally, although the Act has been upheld in three circuits by the Circuit Courts of Appeal, there is no unanimity of opinion on the basis of the decisions.

Seese v. Bethlehem Steel Company, 168 Fed. 2nd 58.

Rogers v. Reynolds, 166 Fed. (2d) 317.

An authoritative decision of this court is required in order that the rights of several thousand litigants in actions now pending in the district courts may finally be determined.

2. The Circuit Court of Appeals has decided important questions of Federal law in a way which appears to conflict with applicable decisions of this court.

(a) In holding that the rights of which petitioners were deprived by Section 2 (a) of the Act are not protected by the Fifth Amendment of the United States Constitution, the Circuit Court of Appeals failed to follow and apply the following decisions of the court, among others:

Pacific Mail Steamship Company v. Joliffe, 2 Wallace 450, 17 L. ed. 805.

United States v. General Motors Corporation, 323 U. S. 373, 89 L. ed. 311.

Ettor v. City of Tacoma, 228 U. S. 148, 57 L. ed. 773.

Coombes v. Getz, 285 U. S. 434, 76 L. ed. 866.

(b) In failing to condemn the Portal-to-Portal Act as a legislative invasion of the judicial power in violation of Article III, Section 1 of the Constitution, the Circuit Court of Appeals reached a decision not consistent with the following authorities in this court:

Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

James v. Appel, 192 U. S. 129, 48 L. ed. 377.

Prentis v. Atlantic Coastline Co., 211 U. S. 210, 52 L. ed. 150.

United States v. Klein, 13 Wallace 128, 20 L. ed. 519.

Wherefore, your petitioners respectfully pray that a writ of certiorari issue to review the decision of the Circuit Court of Appeals for the Sixth Circuit in these actions.

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In the

Supreme Court of the United States

OCTOBER TERM, 1948

No. 365

FISCH, et al.,
Petitioners,
vs.
GENERAL MOTORS CORPORATION,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Summary of Argument	4
Argument	5
Point I—Numerous District Courts Have Unanimously Upheld The Constitutionality Of Section 2 Of The Portal Act On Motions to Dismiss the Complaints Before Trial. Three Courts of Appeals Have Unanimously Affirmed On Identical Grounds	5
Point II—The Decision Of The Court Of Appeals Is In Accord With The Decisions Of This Court Regarding The Power To Regulate Commerce Granted Congress By The Constitution	10
Point III—The Decision Of The Court Of Appeals Is In Accord With The Decisions Of This Court Regarding The Power To Regulate The Jurisdiction Of Inferior Courts Granted Congress By The Constitution	14
Point IV—The Dismissal For Lack Of Jurisdiction Of The Independent Contract Actions Alleged By The Amended Complaint Was In Accord With The Decisions Of This Court	16
Conclusion	18

APPENDICES

		Page
A.	Text of Section 1 and Sections 2(a)-(d) of The Portal-to-Portal Act of 1947 (c. 52, Public Law 49, May 14, 1947)	19
B.	Decisions By District Courts Dismissing "Portal-to-Portal" Actions Under Section 2 of The Portal Act	
	1. Summary By District and Judge	22
	2. List By Circuit and District	25
C.	Unreported Dismissals By District Courts of "Portal-to-Portal" Actions Under Section 2 of The Portal Act	
	1. Summary By District and Judge	34
	2. List By Circuit and District	36
D.	Summary of Reported and Unreported Dismissals By District Courts of "Portal-to-Portal" Actions Under Section 2 of The Portal Act	45

INDEX OF CASES

(Referred to in text of brief)

Addyston Pipe & Steel Co. v. U. S. (1899) 175 U. S. 211, 228-230 11

American Power & Light Co. v. S. E. C. (1946) 329 U. S. 90, 99, 103-104, 106-107 ..... 10, 12

Atallah v. Hubert & Son (CCA 4th, July 7, 1948) 168 Fed. 2d 993; cert. denied, Nov. 15, 1948 ..... 2, 6, 8

Battaglia et al. v. General Motors Corp. (CCA 2d, July 8, 1948), 169 Fed. 2d 254; cert. denied, Dec. 6, 1948 ..... 2, 6, 8, 9

Boehle v. Electric Metallurgical Co., Ore., June 9, 1947, 72 F. Supp. 21 6

	Page
Brooklyn Savings Bank v. O'Neil (1944), 324 U. S. 697, 704-705	11
Clark v. Paul Gray, Inc. (1939), 306 U. S. 583, 589	17
Cochran v. St. Paul & Tacoma Lumber Co., WD Wash., May 26, 1947, 73 F. Supp. 288	6
Coombes v. Getz (1932) 285 U. S. 434	13
Darr v. Mutual Life Insurance Co. (CCA 2d, July 8, 1948) 169 Fed. 2d 262; cert. denied Nov. 22, 1948	2, 7
Ettor v. City of Tacoma (1913) 228 U. S. 148	13
Fisch, et al. v. General Motors Corporation and Bateman, et al. v. Ford Motor Company (CCA 6th, August 2, 1948) 169 Fed. 2d 269	6, 8, 9
Fleming v. Rhodes (1947) 331 U. S. 100	11
James v. Appel (1903) 192 U. S. 129	16
Jewel Ridge Corp. v. U. M. W. (1943) 325 U. S. 161, 167	11
Kemp v. Day & Zimmerman (Iowa S. C. June, 1948) ... Iowa ...; 33 N. W. 2d 569; 8 WH Cases 78	6
Kilbourn v. Thompson (1880) 103 U. S. 168	15
Kline v. Burke Construction Co. (1922) 260 U. S. 226, 234	14
Labor Board v. Jones and Laughlin (1937) 301 U. S. 1, 36-37	10
Lockerty v. Phillips (1943) 319 U. S. 182, 187	14
Louisville and Nashville R. R. Co. v. Mottley (1911) 219 U. S. 467, 482	11
Norman v. Baltimore & Ohio R. R. Co. (1935) 294 U. S. 240	11
North American Co. v. S. E. C. (1946) 327 U. S. 686, 705-706	10
Overnight Motor Co. v. Missel (1942) 316 U. S. 572, 574	10

Page

Pacific Mail Steamship Co. v. Joliffe (1864), 2 Wall. 450 ..... 12, 13
Pinel v. Pinel (1916), 240 U. S. 594..... 17
Prentis v. Atlantic Coast Line (1908) 211 U. S. 210 16
Rogers Cartage Co. v. Reynolds (CCA 6th, February 16, 1948) 166 Fed. 2d 317..... 7
Seese v. Bethlehem Steel Co. (CCA 4th, May 5, 1948) 168 Fed. 2d 58..... 6, 8, 9
Sunshine Coal Co. v. Adkins (1940) 310 U. S. 381, 394 12
Sveltik v. Vultee Aircraft Corp., ND Tex., September 15, 1947, 16 U. S. Law Week 2161; 7 WH Cases 282 6
Tennessee Coal, Iron and R. R. Co. v. Muscoda Local (1944) 321 U. S. 590, 602, 603..... 10
Thomson v. Gaskill, 315 U. S. 442, 447..... 17
U. S. v. Darby (1941), 312 U. S. 100, 114-115.....10, 12, 13
U. S. v. General Motors Corporation (1944) 323 U. S. 373, 374, 379..... 13-14
United States v. Klein, 13 Wall. 128, 20 L. Ed. 519.. 15
United States v. United Mine Workers of America (1947) 330 U. S. 258, 351..... 14-15
Werner v. Milwaukee Solvay Coke Company (Wis. S. C. March 1948), 252 Wis. 392; 31 N. W. 2d 605 6

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OPINIONS BELOW

The District Court opinion was filed February 27, 1948, (R. 17-20) and is reported in 76 Fed. Supp. 178. The opinion of the Court of Appeals was filed August 2, 1948, (R. 34-45) and is reported in 169 Fed. 2d 266.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code as amended by the Act of June 25, 1948, (Public Law 773; c. 646). The judgment of the Court of Appeals was entered August 2, 1948 (R. 34). The petition was filed on October 25, 1948. Notice of its filing was served on Respondent on November 24, 1948.

QUESTIONS PRESENTED

The primary questions raised by the petition are the same as those presented in *Atallah v. Hubert & Son* (CCA 4th, July 7, 1948), 168 Fed. 2d 993; cert. den. (No. 340) November 15, 1948 and in *Battaglia et al. v. General Motors Corporation* (4 cases) (CCA 2d July 8, 1948), 169 Fed. 2d 254; cert. den. (No. 320-323) December 6, 1948*. These are:

Congress found that the retroactive enforcement of Section 7 (a) of the Fair Labor Standards Act construed as requiring compensation for "portal-to-portal" activities regardless of any contract, custom or practice to the contrary, constituted a substantial burden on commerce and the courts. To remove such burdens, Congress enacted the Portal-to-Portal Act of 1947. Section 2 of the Act was construed by the lower courts as requiring that a complaint based on Section 7 (a) of the Fair Labor Standards Act and seeking recovery under Section 16 (b)

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*The "Conclusion" to the petitioners' brief (pp. 27-29) is *identical* with Point V (setting forth "the reason relied upon for the allowance of the writ") of the petition in the *Battaglia* case. The same grounds were stated in the petition for certiorari (No. 337) denied by this Court on November 22, 1948, in *Darr v. Mutual Life Insurance Co.* (CCA 2d July 8, 1948), 169 Fed. 2d 262.

of that Act for "portal-to-portal" activities engaged in prior to the effective date of Section 2 of the Portal Act, must allege the facts required by Section 2 in order to state a cause of action and to establish jurisdiction. The facts to be alleged are that a contract, custom or practice to pay for the activities existed between the employee and the employer at the time that the activities were engaged in.

1. Is Section 2 of the Portal Act, as so applied, unconstitutional because it abrogates rights which are protected by the Fifth Amendment to the Constitution?

2. Is Section 2 of the Portal Act, as so applied, unconstitutional because it is an attempt by Congress to interfere with the powers granted the judiciary under Article III, Section 1 of the Constitution?

The subsidiary question presented by the petitioners is as follows:

The complaint was amended to allege that Respondent entered into "certain" contracts with the United States which required the Respondent to comply with the Fair Labor Standards Act. The petitioners contend that thereby the Respondent was under a contractual obligation to pay for the alleged "portal-to-portal" activities. The petitioners further contend that they are third party beneficiaries of such obligation and, as such, are entitled to recover therefor by contract actions which are independent of the Fair Labor Standards Act and the Portal Act. The jurisdictional basis for such independent contract actions was alleged by the amendment to be diversity of citizenship. The jurisdictional amount was alleged as follows: "The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars." The amendment claimed a total of $700,000 on behalf of 682 named plaintiffs or an average of $1026 per claimant.

Did the lower court err in dismissing the independent contract actions alleged by the amended complaint for lack of jurisdiction?

STATUTES INVOLVED

The petitioners' brief does not set forth the applicable sections of the Portal Act. For the Court's convenience, therefore, the full text of Section 1 and Section 2 (a)-(d) of the Act are reprinted in Appendix A to this brief.

SUMMARY OF ARGUMENT

There are no special and important reasons for granting the petition:

(1) There is complete unanimity of opinion in numerous lower federal courts and in all of the Courts of Appeals that Section 2 of the Portal Act as construed by the lower court is a constitutional exercise by Congress of its power over commerce. Unless this Court feels that this unanimous conclusion is open to question, this Court's consideration of the issue is not necessary to settle the status of pending cases.

(2) Had the Court of Appeals agreed with the petitioners' contention that the Section violates the Fifth Amendment, the decision would clearly have been in conflict with the decisions of this Court regarding the power over commerce granted Congress by the Constitution.

3. Had the Court of Appeals agreed with the petitioners' contention that the Section constitutes an interference with the judiciary, the decision would clearly have been in conflict with the decisions of this Court regarding the power over the jurisdiction of inferior courts granted Congress by the Constitution.

4. Under the decisions of this Court, there clearly was no jurisdiction in the District Court to entertain the independent contract actions alleged by the amended complaint.

ARGUMENT

Point I.

NUMEROUS DISTRICT COURTS HAVE UNANIMOUSLY UPHELD THE CONSTITUTIONALITY OF SECTION 2 OF THE PORTAL ACT ON MOTIONS TO DISMISS THE COMPLAINTS BEFORE TRIAL. THREE COURTS OF APPEALS HAVE UNANIMOUSLY AFFIRMED ON IDENTICAL GROUNDS.

There are numerous "portal-to-portal" cases in which the same contentions under the Constitution that are now made by the petitioners were presented to and considered by lower federal courts. Not one of these cases has come to the attention of Respondent's counsel in which the contentions were accepted by the court.

Counting only decisions in which opinions were written and reported, a total of fifty-two federal district judges sitting in thirty-three federal districts in all ten federal circuits have granted defendants' motions to dismiss under Section 2 of the Portal Act in almost two hundred "portal-to-portal" actions. See Appendix B *infra*, which contains a summary and a list of such dismissals by federal district and judge.* In each instance, the complaint sought recovery for activities engaged in prior to the effective date of the Portal Act. In each instance, the motion was based on the failure of the complaint to allege the facts required by Section 2 of that Act. In each

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* Appendix C *infra* contains a similar summary and list of the dismissal of more than one hundred unreported cases which have been brought to the attention of Respondent's counsel. Appendix D *infra* contains a summary of both the reported and unreported dismissals by federal circuit and district.

instance, the court found Section 2 of the Act constitutional.

Five appeals from the dismissals of eight such cases were perfected and decided—two in the Fourth Circuit; one in the Second Circuit and two in the Sixth Circuit. In each case the court unanimously affirmed the dismissal on the ground that Section 2 of the Portal Act was within the power over commerce granted Congress by the Constitution. *Seese v. Bethlehem Steel Co.* (CCA 4th, May 5, 1948) 168 Fed. 2d 58; *Atallah v. Hubert & Son* (CCA 4th, July 7, 1948) 168 Fed. 2d 993, cert. den. Nov. 15, 1948; *Battaglia, et al. v. General Motors Corporation* (4 cases), (CCA 2d, July 8, 1948) 169 Fed. 2d 254, cert. den. Dec. 8, 1948; *Fisch, et al. v. General Motors Corporation* and *Bateman, et al. v. Ford Motor Company* (CCA 6th, August 2, 1948) 169 Fed. 2d 269, R. 34.

Two state supreme courts have similarly found Section 2 of the Portal Act constitutional on the same ground. *Werner v. Milwaukee Solvay Coke Company* (Wis. S. C. March, 1948) 252 Wis. 392; 31 N. W. 2d 605; *Kemp v. Day & Zimmerman* (Iowa S. C. June, 1948) —— Iowa ——; 33 N. W. 2d 569; 8 W. H. cases 78.

The petitioners' brief (p. 28) cites without comment, three district court cases in support of the statement that "many doubts" have been expressed "as to the propriety and constitutionality of the Act."

In two of the three cases, the courts granted the defendants' motions to dismiss the complaints after finding that Section 2 of the Portal Act is constitutional. *Cochran v. St. Paul & Tacoma Lumber Co.*, W. D. Wash., May 26, 1947, 73 Fed. Supp. 288; *Boehle v. Electric Metallurgical Co.*, Ore., June 9, 1947, 72 Fed. Supp. 21. In the third case (*Sveltik v. Vultee Aircraft Corp.* (N. D. Tex., 1947) 16

U. S. Law Week 2161; 7 W. H. Cases 282) the court deferred the question without consideration:

> "I could learn a whole lot more by reading your briefs; I will admit that. But for the present I overrule defendant's plea to the jurisdiction * * *"

The petitioners' brief (p. 28) also cites without comment, the decisions of two Courts of Appeals in support of the statement that "there is no unanimity of opinion on the basis of the decisions" in the circuit courts. The reason for the lack of comment is obvious; no conflict exists. All the decisions of the Courts of Appeals agree that the Act is within the power over commerce granted Congress.

One of the cases cited by the petitioners' brief (p. 28) is *Rogers Cartage Co. v. Reynolds,* CCA 6 Feb., 1948, 166 Fed. 2d 317, which involved the constitutionality of Sections 9 and 11 of the Portal Act. The court found both sections constitutional on the ground that they were within the commerce power.

> "Congress, in the exercise of its power to regulate interstate commerce, may interfere with valuable property rights." The rights asserted here "are purely the creature of statute." 166 Fed. 2d at 320-321.

In *Darr v. Mutual Life Insurance Co.* (CCA 2, July, 1948) (169 Fed. 2d 262, cert. den. Nov. 22, 1948 (not cited by the petition) the constitutionality of the same sections of the Act was questioned. The Court of Appeals for the Second Circuit came to the same conclusion on the same ground:

> "We hold, therefore, as did the Sixth Circuit in *Rogers Cartage Co. v. Reynolds,* 166 F. 2d 317, that, even if appellants' rights are considered as contractual, these two sections are a valid exercise of the

> constitutional power of Congress to legislate in the field of interstate commerce * * *." 169 Fed. 2d at 266.

The second case cited by the petitioners to support the claim that there is no unanimity of opinion in the Courts of Appeals (the *Seese* case, *supra*), is one of the four Court of Appeals' decisions all of which specifically decided that Section 2 of the Portal Act is a constitutional exercise by Congress of its power over interstate commerce.

In the *Seese* case the Court of Appeals for the Fourth Circuit stated:

> "The answer is that even rights arising out of contract cannot fetter Congress in the exercise of a power granted it by the Constitution and that the rights stricken down by the statute are not rights arising out of contracts at all but rights created by statute as an incident of the statutory regulation of commerce." 168 Fed. 2d at 62.

On July 7, 1948, the same court in a *per curiam* opinion affirmed a similar dismissal on the same grounds. *Atallah v. Hubert & Son*, 168 Fed. 2d 993, cert. den. Nov. 15, 1948.

The Court of Appeals for the Second Circuit in affirming the dismissal of four such cases stated (*Battaglia v. General Motors Corporation*, 169 Fed. 2d 254, cert. den. December 6, 1948):

> "We find ourselves, then, in agreement with the decision of the Circuit Court of Appeals for the Fourth Circuit in Seese v. Bethlehem Steel Co., 4 Cir., 168 F. 2d 58." 169 Fed. 2d at 262.

The Court of Appeals for the Sixth Circuit in affirming the similar dismissal of the present two cases by the five district judges sitting *en banc* in the Eastern District of Michigan, reached the same conclusion (*Fisch v. General*

Motors Corporation; Bateman v. Ford Motor Company, 169 Fed. 2d at 271):

> "The proposition that their rights granted by the Congress under the commerce clause could not be taken away by the congressional legislation under the same clause, is self-contradictory.
>
> "Rights secured even by private contract may be abrogated by subsequent legislation when authorized by constitutional provisions."

All three Courts of Appeals specifically rejected the contention that Section 2 of the Portal Act constitutes an interference with the powers granted the judiciary under Article III, Section 1 of the Constitution. *Seese* case, 168 Fed. 2d at 62; *Battalgia* case, 169 Fed. 2d at 261-262; *Fisch* case, 169 Fed. 2d at 272.

All three Courts of Appeals specifically rejected the petitioners' contention that a decision on the constitutional questions should await a trial. *Seese* case, 168 Fed. 2d at 59; *Battaglia* case, 169 Fed. 2d at 256-257; *Fisch* case, 169 Fed. 2d at 269.

It is clear that all of the large number of lower federal courts and all of the three Courts of Appeals which have passed on the contentions made by the petitioners unanimously agree that Section 2 of the Portal Act as construed by the lower court does not violate the Constitution.

Unless this Court feels that the conclusion is open to question, consideration by this Court of the contentions made by the petitioners is not necessary to settle the status of similar claims still pending in the courts.

Point II.

THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THIS COURT REGARDING THE POWER TO REGULATE COMMERCE GRANTED CONGRESS BY THE CONSTITUTION

The broad scope of the plenary power granted Congress by the commerce clause has been clearly indicated in a number of recent decisions by this Court.

In *U. S. v. Darby* (1941) 312 U. S. 100, in upholding the constitutionality of the Fair Labor Standards Act, which involved the same form of activity in commerce as is affected by the Portal Act, Justice Stone stated:

> "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.' *Gibbons v. Ogden, supra,* 196.
>
> "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." 312 U. S. at 114-115.

See also: *Labor Board v. Jones and Laughlin* (1937), 301 U. S. 1, 36-37; *North American Co. v. S. E. C.* (1946), 327 U. S. 686, 705-706; *American Power & Light Co. v. S. E. C.* (1946), 329 U. S. 90, 99, 103-104.

The rights and remedies which the petitioners sought to enforce under the Fair Labor Standards Act have been described by this Court as statutory. See: *Overnight Motor Co. v. Missel* (1942), 316 U. S. 572, 574; *Tennessee Coal, Iron and R. R. Co. v. Muscoda Local* (1944), 321 U.

S. 590, 602, 603; *Jewel Ridge Corp. v. UMW* (1943), 325 U. S. 161, 167.

This Court has held that these rights could not be waived because they are statutory rights conferred on private parties in the public interest and in the furtherance of a Congressional policy for the regulation of commerce. *Brooklyn Savings Bank v. O'Neil* (1944) 324 U. S. 697, 704.

The rights affected by the Portal Act are only those rights which are based solely on the Fair Labor Standards Act.

This Court has repeatedly held that even purely private contractual rights cannot fetter the plenary powers granted Congress by the Constitution. In *Louisville and Nashville R. R. Co. v. Mottley* (1911) 219 U. S. 467, 482, this Court said:

> "That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist."

See also: *Norman v. Baltimore & Ohio R. R. Co.* (1935), 294 U. S. 240; *Fleming v. Rhodes* (1947), 331 U. S. 100, 109; *Addyston Pipe & Steel Co. v. U. S.* (1899), 175 U. S. 211, 228-230.

Since contractual rights have a "congenital infirmity" when they relate to a subject matter that lies within the control of Congress (*Norman v. B. & O. R. R. Co.*, 294 U. S. at 307) clearly rights and remedies conferred by Congress for the specific purpose of fostering commerce are subject to defeasance when Congress finds that their immediate withdrawal is necessary to prevent great injury to commerce.

The petitioners have attacked the motives and conclusions of Congress in the enactment of the Portal Act.

This Court has repeatedly warned that it is not its function to re-examine the conclusions of Congress or the policy and remedies adopted by Congress in the exercise of its constitutional powers. In the *Darby* case, *supra*, Justice Stone stated:

> "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the Courts are given no control. *McCray v. U. S.*, 195 U. S. 27; *Sonzinsky v. U. S.*, 300 U. S. 506, 513 and cases cited. The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power." 312 U. S. at 115.

See also: *American Power & Light* case, *supra*, 329 U. S. at 90, 106-107; *Sunshine Coal Co. v. Adkins* (1940), 310 U. S. 381, 394.

The Court of Appeals therefore held in conformance with the decisions of this Court in deciding that rights created by Congress under its commerce power were subject to withdrawal by Congress in the further exercise of such power.

The petitioners' brief (pp. 28-29) lists four decisions of this Court in support of the contention that the decision of the Court of Appeals erroneously held that there was no violation of the Fifth Amendment.

None of these four decisions involved the exercise by Congress of its power over commerce.

Three of these four decisions involved state enactments. *Pacific Mail Steamship Co. v. Joliffe* (1864) 2 Wall. 450;

Ettor v. City of Tacoma (1913) 228 U. S. 148; and *Coombes v. Getz* (1932), 285 U. S. 434. None of these enactments were passed in the exercise of the state's police power which would be necessary to make them in any way analogous to the present statute. See: *U. S. v. Darby,* p. 10 *supra.* None of the enactments reflected a conclusion by the legislature that the termination of the rights granted by the prior enactment was necessary.

In the *Joliffe* case the court emphasized that the plaintiff changed his position in reliance on the statutory provision and that the form of the new statute clearly indicated no intention in the legislature to cut off rights created under the prior statute. This was a four to three decision, the minority maintaining that the statutory right fell even though the legislature did not show in the new statute any intention to cut off the right under the prior statute. The *Coombes* case (a five to three decision) involved similar considerations with the three dissenting Justices (Cardozo, Brandeis and Stone) taking the same position as was taken by the minority in the *Joliffe* case. In the *Ettor* case, the court held that the city could not repudiate its obligation to pay damages resulting from grading authorized by statute on that condition, solely because of the subsequent repeal of the statute.

The fourth case cited by the petition (*U. S. v. General Motors Corporation* (1944), 323 U. S. 373) involved a question entirely foreign to the present questions:

> "The problem involved is the ascertainment of the just compensation required by the Fifth Amendment of the Constitution, where in the exercise of the power of eminent domain, temporary occupancy of a portion of a leased building is taken from a tenant who holds under a long term lease. • • • The award was therefore limited to the market value

of the occupancy of a vacant building. The question is whether any other element of value inhered in the interest taken." 323 U. S. at 374, 379.

Point III.

THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THIS COURT REGARDING THE POWER TO REGULATE THE JURISDICTION OF INFERIOR COURTS GRANTED CONGRESS BY THE CONSTITUTION

The derivation and scope of the jurisdiction of all inferior federal courts has been described in this Court's decision in *Lockerty v. Phillips* (1943) 319 U. S. 182, 187:

> "The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'"

This Court has further stated in *Kline v. Burke Construction Co.* (1922) 260 U. S. 226, 234, that:

> "And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors v. Osbornes,* 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right."

In *United States v. United Mine Workers of America* (1947), 330 U. S. 258, Justice Rutledge (in a dissent from a holding involving other questions) summarized the holdings of this Court on that question as follows:

> "And where Congress has acted expressly to exclude particular subject matter from the jurisdiction of any court, except this Court's original jurisdiction, I know of no decision here which holds the exclusion invalid, * * *" 330 U. S. at 351.

The petitioners' brief (p. 29) urges that Section 2 of the Portal Act constitutes an invasion of the powers granted the judiciary under Article III Section 1 of the Constitution.

The Portal Act is expressly based on the acceptance by Congress of this Court's construction of Section 7 (a) of the Fair Labor Standards Act and Congress' finding that Section 7 (a), as so construed, created conditions inimical to commerce and the operation of the courts. Section 1 of The Portal Act, Appendix A, *infra*. Congress concluded that to remedy these conditions it was necessary to enact Section 2 of the Portal Act which, *inter alia*, withdraws from inferior courts part of the jurisdiction that Congress had previously conferred on such courts under The Fair Labor Standards Act.

The petitioner's brief (p. 29) lists four cases to srpport the contention that the decision of the Court of Appeals conflicts with the decisions of this Court on that question.

None of the four cases is applicable. *United States v. Klein*, 13 Wall. 128, 20 L. Ed. 519, involved an attempt by Congress to interfere with pardons granted by the President in pursuance of his powers under Article II Section 2 of the Constitution:

> "Its great and controlling purpose is to deny to pardons granted by the President the effect which this court adjudged them to have." 13 Wall. at 145.

Kilbourn v. Thompson (1880) 103 U. S. 168, involved the question whether Congress had constitutional authority to

punish a witness for contempt. In *James v. Appel* (1903), 192 U. S. 129, it was held that a territorial statute providing for an automatic denial of a motion for new trial, if not ruled on by a judge during the term, did not constitute an interference with the judiciary and was not inconsistent with the grant by Congress of common law jurisdiction to the courts of the territory. In *Prentis v. Atlantic Coast Line* (1908) 211 U. S. 210, this Court (per Justice Holmes), held that though the proceedings fixing railroad rates appeared judicial in form they were in fact legislative. The action was remanded to await completion of the legislative process before allowing the railroad to attack the rates as confiscatory.

The decision of the Court of Appeals therefore is in clear accord with the decisions of this Court regarding the powers granted Congress under Article III Section 1 of the Constitution.

Point IV.

THE DISMISSAL FOR LACK OF JURISDICTION OF THE INDEPENDENT CONTRACT ACTIONS ALLEGED BY THE AMENDED COMPLAINT WAS IN ACCORD WITH THE DECISIONS OF THIS COURT

Afer Respondent's motion to dismiss, the complaint was amended to allege that "during the period" since October 24, 1938, the Respondent entered into "certain" contracts with the United States which contained a provision requiring the Respondent to comply with the Fair Labor Standards Act. Alleg. XX, R. 13. Petitioners contend that such provision created a contractual obligation in the Respondent to compensate its employees for "portal-to-portal" activities. They further contend that they are third party beneficiaries of that contractual obligation and as such are entitled to recover time and one-half for the "portal-to-

portal" activities described in the complaint. Petitioners also contend that "this theory of recovery is neither predicated upon nor is it dependent upon the continuing validity or existence of the Fair Labor Standards Act with or without its amendment by the Portal-to-Portal Act" (petitioners' brief p. 7).

Jurisdiction to entertain these independent contract claims is alleged by the amendment to exist because of a diversity of citizenship. The only allegation of the jurisdictional amount required for such actions is the statement that: "The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars." Alleg. XXIV, R. 14. The contract claims are alleged by the amendment to total $700,000. R. 15. A total of 682 named plaintiffs have joined in the action (R. 29-30). Each claimant, therefore, is seeking an average of $1026.

It is abundantly clear from the decisions of this Court that these individual claims may not be aggregated for jurisdictional purposes. *Clark v. Paul Gray, Inc.* (1939), 306 U. S. 583, 589; *Pinel v. Pinel* (1916), 240 U. S. 594; *Thomson v. Gaskill* (1941), 315 U. S. 442, 447. The Court of Appeals, therefore, held in accord with these decisions when it decided that: "Each plaintiff has a separate and distinct demand for the compensation to him and there is no allegation that as to him the matter in controversy exceeds the jurisdictional sum or value of $3,000." 169 Fed. 2d at 274, R. 44.

CONCLUSION

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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December 20, 1948.

APPENDIX A

TEXT OF SECTION 1 AND SECTIONS 2(a)-(d) OF THE PORTAL-TO-PORTAL ACT OF 1947 (c. 52, PUBLIC LAW 49, MAY 14, 1947)

Section 1

"(a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be en-

couraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

"The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

"The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

"The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

"The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

"(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

Section 2(a)-(d)

"(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this act, except an activity which was compensable by either

"(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

"(d) No court of the United States, of any State, Territory or possession of the United States, or of the District

of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

APPENDIX B-1

SUMMARY OF DECISIONS BY DISTRICT COURTS DISMISSING "PORTAL-TO-PORTAL" ACTIONS UNDER SECTION 2 OF THE PORTAL ACT

District Court	District Judge	Total Cases Dismissed
First Circuit		
D. Mass.	Sweeney	17
Second Circuit		
W. D. N. Y.	Knight	6
S. D. N. Y.	Coxe	3
	Goddard	1
	Knox	1
	Clancy	16
	Hulbert	1
N. D. N. Y.	Brennan	1
D. Conn.	Hincks	3
Third Circuit		
E. D. Pa.	Kirkpatrick	1
	Follmer	1

District Court	District Judge	Total Cases Dismissed
W. D. Pa.	Gibson	43
D. N. J.	Meaney	1
	Forman	1
	Madden	3
Fourth Circuit		
D. Md.	Chesnut	1
Fifth Circuit		
N. D. Ga.	Russell	5
S. D. Tex.	Atwell	1
	Kennerly	1
N. D. Tex.	Atwell	1
Sixth Circuit		
E. D. Mich.	Picard, O'Brien, Lederle, Koscinski, Levin	2
N. D. Ohio	Jones	3
E. D. Tenn.	Darr	2
	Taylor	2
Seventh Circuit		
N. D. Ill.	Barnes	1
	Campbell	1
E. D. Ill.	Lindley	2
E. D. Wis.	Duffie	1
W. D. Wis.	Stone	2
Eighth Circuit		
D. Minn.	Donovan	3
	Nordbye	2
S. D. Iowa	Dewey	6
W. D. Mo.	Ridge	2
	Reeves	4
E. D. Mo.	Hulen	2

District Court	District Judge	Total Cases Dismissed
Ninth Circuit		
D. Mont.	Pray	1
D. Idaho	Clark	28
D. Ore.	McColloch	1
W. D. Wash.	Leavy	4
E. D. Wash.	Driver	1
N. D. Cal.	Roche, Goodman & Harris	5
	Goodman	1
S. D. Cal.	Yankwich	2
	Hall	1
	O'Connor	2
Tenth Circuit		
N. D. Okla.	Savage	1
E. D. Okla.	Rice	1
D. Kans.	Mellott	3
33	52	194
Total Districts	Total Judges	Total Cases

APPENDIX B-2

LIST OF DISTRICT COURTS' DECISIONS DISMISSING "PORTAL-TO-PORTAL" ACTIONS UNDER SECTION 2 OF THE PORTAL-TO-PORTAL ACT OF 1947

First Circuit

MASSACHUSETTS

Moeller v. Eastern Gas & Fuel Associates, Sweeney, December 22, 1947, 74 F. Supp. 937.

NOT OFFICIALLY REPORTED

Millet v. Bethlehem-Hingham Shipyard (3 cases), Sweeney, June 4, 1948, 8 W. H. Cases 46.

Mitchell v. Boston Sausage Co. (11 cases), Sweeney, June 4, 1948, 8 W. H. Cases 49.

Finn v. Bethlehem Steel Co., Sweeney, June 4, 1948, 8 W. H. Cases 51.

Wiley v. Reece Corp., Sweeney, June 4, 1948, 8 W. H. Cases 52.

Second Circuit

NEW YORK—WESTERN DISTRICT

Battaglia, et al. v. General Motors Corporation (4 cases), Knight, December 15, 1947, 74 F. Supp. 274; affirmed July 8, 1948, 169 F. 2d 254.

Sinclair v. U. S. Gypsum Company, Knight, January 24, 1948, 75 F. Supp. 439.

NOT OFFICIALLY REPORTED

Donovan v. Republic Steel Corporation, Knight, January 22, 1948, 7 W. H. Cases 644; 14 C. C. H. Labor Cases, par. 64,295.

NEW YORK—SOUTHERN DISTRICT

Borucki, et al. v. Continental Baking Company, Coxe, November 7, 1947, 74 F. Supp. 815.

NOT OFFICIALLY REPORTED

Sochulak v. American Brake Shoe Company, Goddard, January 5, 1948, 7 W. H. Cases 584; 13 C. C. H. Labor Cases, par. 64,220.

Shaietvitz v. Laws, Knox, May 3, 1948, 7 W. H. Cases 975.

Markert and 699 others, & c. v. Swift & Co., Inc., et al., Coxe, November 12, 1947, 7 W. H. Cases 459, 13 C. C. H. Labor Cases, par. 64,145; Coxe, June 23, 1948, 8 W. H. Cases 159.

Bonner, et al. v. Elizabeth Arden, Inc., Coxe, November 22, 1947, 7 W. H. Cases 469, 13 C. C. H. Labor Cases, par. 64,147; Coxe, June 22, 1948, 8 W. H. Cases 68.

Lemme v. Caruso Foods, Inc. (fifteen cases), Clancy, January 17, 1948, 7 W. H. Cases 626.

Cook v. Industrial Rayon Corp., Clancy, June 23, 1948, 8 W. H. Cases 218.

Abernathy v. General Motors Corporation, Hulbert, May 8, 1948, 7 W. H. Cases 1027.

NEW YORK—NORTHERN DISTRICT

Cardinale, et al. v. General Motors Corporation, Brennan, October 25, 1947, 76 F. Supp. 743.

CONNECTICUT

Local 626, UAW-CIO v. General Motors Corporation (2 cases), Hincks, October 22, 1947, 76 F. Supp. 593.

Moeller, et al. v. Atlas Powder Company, Hincks, October 22, 1947, 76 F. Supp. 707.

Third Circuit

PENNSYLVANIA—EASTERN DISTRICT

Battery Workers' Union v. Electric Company, Kirkpatrick, January 30, 1948, 78 F. Supp. 947.

NOT OFFICIALLY REPORTED

Medrick v. Textile Machine Works, Inc., Follmer, July 20, 1948, 8 W. H. Cases 202.

PENNSYLVANIA—WESTERN DISTRICT

Hart v. Aluminum Company of America (forty-three cases), Gibson, October 8, 1947, 73 F. Supp. 727.

NEW JERSEY

Grazeski v. Federal Shipbuilding & Dry Dock Company, Meaney, April 16, 1948, 76 F. Supp. 845.

Hoyt v. Merritt-Chapman & Scott Corp., Madden, August 9, 1948, 79 F. Supp. 106.

Industrial Union v. New York Shipbldg. Corp. (2 cases), Madden, August 9, 1948, 79 F. Supp. 104.

NOT OFFICIALLY REPORTED

Hess v. E. I. duPont de Nemours & Company, Forman, July 9, 1948, 8 W. H. Cases 118.

Fourth Circuit

MARYLAND

Seese, et al. v. Bethlehem Steel Company, Chesnut, October 14, 1947, 74 F. Supp. 412; affirmed May 5, 1948, 168 F. 2d 58.

Fifth Circuit

GEORGIA—NORTHERN DISTRICT

May, et al. v. General Motors Corporation, Russell, October 17, 1947, 73 F. Supp. 878.

NOT OFFICIALLY REPORTED

Akins, et al. v. Firestone Tire & Rubber Company, Russell, October 17, 1947, 7 W. H. Cases 356.

Cassels, et al. v. General Motors Corporation, Russell, October 17, 1947, 7 W. H. Cases 355.

Glynn Metal Trades Council, et al. v. J. A. Jones Construction Company, Inc., Russell, October 17, 1947, 7 W. H. Cases 355.

Robison, et al. v. General Motors Corporation, Russell, October 17, 1947, 7 W. H. Cases 355.

TEXAS—NORTHERN DISTRICT

Burfiend v. Eagle-Picher Company, Atwell, May 21, 1947, 71 F. Supp. 929.

TEXAS—SOUTHERN DISTRICT

Story, et al. v. Todd Houston Shipbuilding Corporation, Kennerly, July 17, 1947, 72 F. Supp. 690.

Sixth Circuit

MICHIGAN—EASTERN DISTRICT

Fisch, et al. v. General Motors Corporation; Bateman, et al. v. Ford Motor Company, Picard, O'Brien, Lederle, Koscinski, Levin, February 27, 1948, 76 F. Supp. 178; affirmed August 2, 1948, 169 F. 2d 266.

OHIO—NORTHERN DISTRICT

Fajack v. Cleveland Graphite Company, Jones, July 23, 1947, 73 F. Supp. 308.

NOT OFFICIALLY REPORTED

Hassel v. Standard Oil Company, Jones, May 4, 1948, 8 W. H. Cases 41.

Smith v. Cleveland Pneumatic Tool Company, Jones, March 30, 1948, 7 W. H. Cases 855.

TENNESSEE—EASTERN DISTRICT

Lasater, et al. v. Hercules Powder Company, Darr, July 25, 1947, 73 F. Supp. 264.

Colvard, et al. v. Southern Wood Preserving Company, Darr, November 1, 1947, 74 F. Supp. 804.

NOT OFFICIALLY REPORTED

Young v. Kellex Corporation, Taylor, January 2, 1948, 7 W. H. Cases 562.

Jesse v. Tennessee Eastman Corporation, Taylor, May 6, 1948, 7 W. H. Cases 983.

Seventh Circuit

ILLINOIS—NORTHERN DISTRICT

NOT OFFICIALLY REPORTED

McCalpin v. Magnus Metal Corporation, Barnes, July 1, 1948, 8 W. H. Cases 120.

Bauler v. Pressed Steel Car Company, Campbell, May 27, 1948, 8 W. H. Cases 55.

ILLINOIS—EASTERN DISTRICT

NOT OFFICIALLY REPORTED

Smith, et al. v. American Can Co., Lindley, January 12, 1948, 7 W. H. Cases 603.

Green, et al. v. Stokely Foods, Inc., Lindley, January 12, 1948, 7 W. H. Cases 603.

WISCONSIN—EASTERN DISTRICT

Ackerman, et al. v. J. I. Case Company, Duffy, November 4, 1947, 74 F. Supp. 639.

WISCONSIN—WESTERN DISTRICT

NOT OFFICIALLY REPORTED

Lee v. Hercules Powder Co. (2 cases), Stone, March 18, 1948, 8 W. H. Cases 247.

Eighth Circuit

MINNESOTA

Smith, et al. v. Cudahy Packing Company (3 cases), Donovan, September 15, 1947, 73 F. Supp. 141; December 12, 1947, 76 F. Supp. 575.

Plummer v. Minneapolis-Moline Power Implement Company, Nordbye, February 3, 1948, 76 F. Supp. 745.

NOT OFFICIALLY REPORTED

DeMaio v. Grant Storage Battery Company, Nordbye, February 3, 1948, 7 W. H. Cases 721; 14 C. C. H. Labor Cases, par. 64,285.

IOWA—SOUTHERN DISTRICT

NOT OFFICIALLY REPORTED

Hornbeck, et al. v. Dain Manufacturing Company (6 cases), Dewey, September 25, 1947, 7 W. H. Cases 295; 13 C. C. H. Labor Cases, par. 64,055.

MISSOURI—WESTERN DISTRICT

Sadler v. Dickey Clay Manufacturing Company, Ridge, September 30, 1947, 73 F. Supp. 690; Ridge, February 25, 1948, 78 F. Supp. 616.

Charles Breusing, et al. v. General Motors Corporation (Fisher Body Div., Kansas City Plant), Reeves, October 29, 1947, 74 F. Supp. 541.

Bumpus v. Remington Arms Company, Reeves, December 10, 1947, 74 F. Supp. 788; March 27, 1948, 77 F. Supp. 94.

Lockwood v. Hercules Powder Company, Ridge, February 16, 1948, 78 F. Supp. 716.

Tucker v. Pratt Whitney, W. D. Mo., March 25 1948, 77 F. Supp. 227.

NOT OFFICIALLY REPORTED

Hayes, et al. v. Hercules Powder Company, Reeves, November 1, 1947, 7 W. H. Cases 381; 13 C. C. H. Labor Cases, par. 64,123.

MISSOURI—EASTERN DISTRICT

Johnson, et al. v. Park City Consolidated Mines Company, Hulen, October 3, 1947, 73 F. Supp. 852.

NOT OFFICIALLY REPORTED

Horner, et al. v. McQuay Norris Manufacturing Company, Hulen, October 3, 1947, 13 C. C. H. Labor Cases, par. 64,086; 7 W. H. Cases 436.

Ninth Circuit

MONTANA

Role v. Neils Lumber Company, Pray, December 19, 1947, 74 F. Supp. 812.

IDAHO

Hollingsworth, et al. v. Federal Mining and Smelting Company (28 cases), Clark, December 12, 1947, 74 F. Supp. 1009.

OREGON

Boehle v. Electric Metallurgical Company, McColloch, June 9, 1947, 72 F. Supp. 21.

WASHINGTON—WESTERN DISTRICT

Cochran, et al. v. St. Paul and Tacoma Lumber Company (4 cases), Leavy, May 26, 1947, 73 F. Supp. 288.

WASHINGTON—EASTERN DISTRICT

NOT OFFICIALLY REPORTED

Miller v. How Sound Mining Company, Driver, May 11, 1948, 8 W. H. Cases 1.

CALIFORNIA—NORTHERN DISTRICT

Alameda, et al. v. Paraffine Companies, Inc. (5 cases), Roche, Goodman and Harris, November 6, 1947, 75 F. Supp. 282.

Kirkham v. Pacific Gas & Electric Company, Goodman, December 22, 1947, 78 F. Supp. 658.

CALIFORNIA—SOUTHERN DISTRICT

Ditto v. Aluminum Company of America, Yankwich, June 9, 1947, 73 F. Supp. 955.

Quinn, et al. v. California Shipbuilding Corporation, Hall, September 29, 1947, 76 F. Supp. 742.

Devine et al. v. Joshua Hendy Corp., S. D. Calif., April 30, 1948, 77 F. Supp. 893.

NOT OFFICIALLY REPORTED

Felton v. Latchford Marble Glass Co., O'Connor, May 26, 1948, 8 W. H. Cases 53.

Tully v. Joshua Hendy Corp., O'Connor, July 28, 1948, 8 W. H. Cases 198.

Tenth Circuit

OKLAHOMA—NORTHERN DISTRICT

NOT OFFICIALLY REPORTED

Adkins v. E. I. duPont de Nemours & Company, Savage, September 26, 1947, 7 W. H. Cases 298; 13 C. C. H. Labor Cases, par. 64,025.

OKLAHOMA—EASTERN DISTRICT

NOT OFFICIALLY REPORTED

McDaniel v. Brown & Root, Inc., Rice, March 6, 1948; amended April 5, 1948, 7 W. H. Cases 978.

KANSAS

NOT OFFICIALLY REPORTED

Elting, et al. v. North American Aviation, Inc. (3 cases), Mellott, November 3, 1947, 7 W. H. Cases 491; 13 C. C. H. Labor Cases, par. 64,154.

APPENDIX C-1

SUMMARY OF UNREPORTED DISMISSALS BY DISTRICT COURTS OF "PORTAL-TO-PORTAL" ACTIONS UNDER SECTION 2 OF THE PORTAL ACT

District Court	District Judge	Total Cases Dismissed
Second Circuit		
D. Conn.	Smith	1
S. D. N. Y.	Conger	3
Third Circuit		
D. N. J.	Forman	1
	Meaney	5
		18
Fourth Circuit		
W. D. Va.		2
Fifth Circuit		
N. D. Tex.	Atwell	1
S. D. Tex.		1
S. D. Ala.	McDuffie	1

District Court	District Judge	Total Cases Dismissed
Sixth Circuit		
N. D. Ohio	Jones	6
S. D. Ohio	Nevin	2
	Druffel	12
W. D. Tenn.	Boyd	23
E. D. Ky.		1
Seventh Circuit		
N. D. Ill.	Campbell	2
	Sullivan	1
	Igoe	2
S. D. Ind.	Baltzell	8
W. D. Wis.	Stone	3
Eighth Circuit		
W. D. Mo.	Duncan	1
	Ridge	1
E. D. Mo.	Hulen	1
W. D. Ark.		1
E. D. Ark.		1
Ninth Circuit		
S. D. Cal.	Weinberger	1
	Hall	1
		1
Tenth Circuit		
D. Utah		13
D. Kans.	Mellott	6
Total Districts	**Total Judges**	**Total Cases**
21	21	120

APPENDIX C-2

LIST OF UNREPORTED DISMISSALS BY DISTRICT COURTS OF "PORTAL-TO-PORTAL" ACTIONS UNDER SECTION 2 OF THE PORTAL ACT*

Second Circuit

CONNECTICUT

Walsh v. United States Aluminum Company, C. A. No. 1980, Smith, July 14, 1947.

NEW YORK—SOUTHERN DISTRICT

McKenna, et al. v. General Motors Corporation (Fisher Body Division), C. A. No. 39-554, Conger, March 22, 1948.

McKenna, et al. v. General Motors Corporation (Chevrolet Motor Division), C. A. No. 39-555, Conger, March 22, 1948.

McKenna, et al. v. General Motors Corporation (Eastern Aircraft Division), C. A. No. 39-556, Conger, March 22, 1948.

Third Circuit

NEW JERSEY

Zuccarello, et al. v. General Motors Corporation, C. A. No. 9481, Forman, April 26, 1948.

Amato, et al. v. General Motors Corporation, C. A. No. 9490, Meaney, April 14, 1948.

Saragino, et al. v. General Motors Corporation, C. A. No. 9437, Meaney, May 14, 1948.

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* This list is not complete. It included only those dismissals that have been brought to the attention of Respondent's counsel by local counsel.

Bruzaitis, et al. v. General Motors Corporation, C. A. No. 9474, Meaney, May 14, 1948.

Ackerson, et al. v. General Motors Corporation, C. A. No. 9509, Meaney, May 14, 1948.

Gawleck, et al. v. General Motors Corporation, C. A. No. 9402, Meaney, May 14, 1948.

Muche, et al. v. Electric Boat Co., C. A. No. 9113, May 14, 1948.

Armstrong, et al. v. Muller Metal Products, Inc., C. A. No. 9456, May 5, 1948.

Elliot, et al. v. Pittsburgh Plate Glass Co., C. A. No. 9467, April 28, 1948.

Elliot, et al. v. E. I. duPont de Nemours & Co., C. A. No. 9467, May 4, 1948.

Moselle, et al. v. Driver-Harris Co., C. A. No. 9480, May 13, 1948.

Eick, et al. v. Hercules Powder Co., C. A. No. 9484, May 13, 1948.

Int. Union, Local 713 v. General Motors Corporation, C. A. No. 9490, May 4, 1948.

Dichter, et al v. Aluminum Co. of America, C. A. No. 9492, April 29, 1948.

Workers v. General Motors Corporation, C. A. No. 9509, May 4, 1948.

Heimann, et al. v. Armour & Co., C. A No. 9529, May 3, 1948.

Armstrong, et al. v. Wright Aeronautical Corp., C. A. No. 9530, May 11, 1948.

Mosele, et al. v. Tube Reducing Corp., C. A. No. 9538, May 11, 1948.

O'Shea, et al. v. National Battery Co., C. A. No. 9554, May 13, 1948.

Barnes, et al. v. E. I. duPont de Nemours & Co., C. A. No. 9652, May 4, 1948.

Froesch, et al. v. Pittsburgh Plate Glass Co., C. A. No. 9682, April 29, 1948.

Barclay, et al. v. Original Trenton Cracker Co., C. A. No. 9780, October 30, 1947.

Froesch, et al. v. Libby-Owens-Ford Glass Co., C. A. No. 9865, May 5, 1948.

McKeown, et al. v. Garden State Hosiery Co., C. A. No. 10030, February 11, 1948.

Fourth Circuit

VIRGINIA—WESTERN DISTRICT

Cornett, et al. v. Hercules Powder Company, C. A. No. 319, November 28, 1947.

John D. Lewhorne, et al. v. Hercules Powder Company, C. A. No. 290, November 28, 1947.

Fifth Circuit

TEXAS—NORTHERN DISTRICT

Ford v. Southern Aircraft Corporation, C. A. No. 2375, Atwell, June 16, 1947.

TEXAS—SOUTHERN DISTRICT

Snyder, et al. v. Todd Galveston Dry Docks, Inc., C. A. No. 487, July 17, 1947.

ALABAMA—SOUTHERN DISTRICT

Farr v. Aluminum Ore Company, C. A. No. 687, McDuffie, June 16, 1947.

Sixth Circuit

OHIO—NORTHERN DISTRICT

Davis, et al. v. Formica Insulation Co., C. A. No. 24490, Jones, July 23, 1947.

Matheson and Saley v. Aluminum Co. of America and American Magnesium Corporation, C. A. No. 24441, Jones, September 1947.

Radden v. Aluminum Company of America, C. A. No. 24437, Jones, September 1947.

Bannister, et al. v. General Motors Corporation, C. A. No. 24557, Jones, September 17, 1947.

Neale, et al. v. General Motors Corporation, C. A. No. 24526, Jones, September 17, 1948.

Moughan v. General Motors Corporation, C. A. No. 24453, Jones, September 17, 1948.

OHIO—SOUTHERN DISTRICT

Heine, et al. v. Allis-Chalmers Mfg. Co., C. A. No. 1646, Druffel, June 13, 1947.

Whitehouse, et al. v. The American Rolling Mill Co., C. A. No. 1648, Druffel, June 2, 1947.

Whitehouse, et al. v. Sawbrook Steel Casting Co., C. A. No. 1654, Druffel, June 2, 1947.

Whitehouse, et al. v. William Powell Co., C. A. No. 1650, Druffel, June 2, 1947.

Whitehouse, et al. v. Hamilton Foundry & Machine Co., C. A. No. 1660, Druffel, June 2, 1947.

Whitehouse, et al. v. American Can Co., C. A. No. 1653, Druffel, June 4, 1947.

Lear, et al. v. Cleveland Automatic Machine Co., C. A. No. 1693, Druffel, June 9, 1947.

Coggshell, et al. v. Ford Motor Co., C. A. No. 1655, Druffel, August 25, 1947.

Whitehouse, et al. v. Aluminum Industries, Inc., C. A. No. 1662, Druffel, June 23, 1947.

Combs, et al. v. Standard Silicate Div., C. A. No. 1664, Druffel, June 2, 1947.

Notz, et al. v. General Motors Corporation, C. A. No. 766, Nevin, September 19, 1947.

Baker, et al. v. General Motors Corporation, C. A. No. 1656, Druffel, June 24, 1947.

Patton, et al. v. General Motors Corporation, C. A. No. 1657, Druffel, August 25, 1947.

Kenney, et al. v. General Motors Corporation, C. A. No. 767, Nevin, September 19, 1947.

TENNESSEE—WESTERN DISTRICT

Kirby, et al. v. General Motors Corporation, C. A. No. 1213, Boyd, February 28, 1948.

Gossett, et al. v. Proctor & Gamble Defense Corporation (22 cases), C. A. No. 399, Boyd, January 10, 1948.

KENTUCKY—EASTERN DISTRICT

Tisa v. American Suppliers, Inc., C. A. No. 533, June 27, 1947.

Seventh Circuit

ILLINOIS—NORTHERN DISTRICT

Workman v. E. I. duPont de Nemours & Co., C. A. No. 47-C-426, Campbell, October 3, 1947.

Thomas, et al. v. Chicago Plating Company, C. A. No. 47-C-46, Sullivan, November 24, 1947.

Malzone, et al. v. General Motors Corporation, C. A. No. 46-C-2103, Campbell, June 4, 1948.

Skup, 1352 Independence, Chicago—Individually and in behalf of Other Employees Similarly Situated v. General Motors Corporation, C. A. No. 47-C-520, Igoe, June 15, 1948.

Mattson, et al. v. General Motors Corporation, C. A. No. 47-C-21, Igoe, June 15, 1948.

INDIANA—SOUTHERN DISTRICT

Price, et al. v. General Motors Corporation, C. A. No. 1281, Baltzell, September 26, 1947.

Ashcraft, et al. v. General Motors Corporation, C. A. No. 223, Baltzell, September 26, 1947.

Stevens, et al. v. General Motors Corporation, C. A. No. 1286, Baltzell, September 26, 1947.

Lilly, et al. v. General Motors Corporation, C. A. No. 1285, Baltzell, September 26, 1947.

Stokes, et al. v. General Motors Corporation, C. A. No. 1305, Baltzell, September 26, 1947.

Brown, et al. v. General Motors Corporation, C. A. No. 1283, Baltzell, September 26, 1947.

Mueller, et al. v. General Motors Corporation, C. A. No. 1286, Baltzell, September 26, 1947.

Leonard, et al. v. General Motors Corporation, C. A. No. 1284, Baltzell, September 26, 1947.

WISCONSIN—WESTERN DISTRICT

Edwards, et al. v. General Motors Corporation, C. A. No. 1832, Stone, April 14, 1948.

Sands, et al. v. General Motors Corporation, C. A. No. 1830, Stone, April 14, 1948.

Adkins v. General Motors Corporation, C. A. No. 1331, Stone, April 14, 1948.

Eighth Circuit

MISSOURI—WESTERN DISTRICT

Breusing, et al. v. General Motors Corporation (Oldsmobile Division-Kansas City Plant), C. A. No. 4506, Duncan, December 9, 1947.

Breusing, et al. v. General Motors Corporation (Chevrolet-Kansas City Plant), C. A. No. 4498, Ridge, December 11, 1947.

MISSOURI—EASTERN DISTRICT

Schilling, et al. and Local No. 25, UAW-CIO v. General Motors Corporation, C. A. No. 5123, Hulen, April 30, 1948.

ARKANSAS—WESTERN DISTRICT

Hardesty v. Aluminum Company of America and Aluminum Ore Co., C. A. No. 315, September, 1947.

ARKANSAS—EASTERN DISTRICT

Hardesty v. Aluminum Company of America and Aluminum Ore Co., C. A. No. 1598, September, 1947.

Ninth Circuit

CALIFORNIA—SOUTHERN DISTRICT

Anger, et al. v. General Motors Corporation, Los Angeles Division, C. A. No. 6168W, Weinberger, November 17, 1947.

Armin, et al. v. Standard Oil Co. of Cal., C. A. No. 6190-PH, Hall, October 16, 1947.

Gibson, et al. v. Consolidated Vultee Aircraft Corp., C. A. No. 6277-BH, June 26, 1947.

Tenth Circuit

UTAH

Smith v. Geneva Steel Co., C. A. No. 1255, August 1, 1947.

Dispenza, et al. v. Utah Copper Company, C. A. No. 976.

Dispenza, et al. v. Utah Copper Company, C. A. No. 1253.

McKissick, et al. v. Park Utah Consolidated Mines Co., C. A. No. 1253.

Draper, et al. v. Silver King Coalition Mines Company, C. A. No. 1290.

Smyth, et al. v. New Park Mining Company, C. A. No. 1291.

Lester, et al. v. American Smelting & Refining Company, C. A. No. 1295.

Pratt, et al. v. American Smelting & Refining Company, C. A. No. 1296.

McCandless, et al. v. United States Smelting, Refining and Mining Company, C. A. No. 1297.

Michaelson, et al. v. United States Smelting, Refining & Mining Company, C. A. No. 1298.

Morton, et al. v. United States Smelting, Refining & Mining Company, C. A. No. 1299.

Cases, et al v. Utah Copper Company, C. A. No. 1310.

Gibbons, et al. v. Utah Ore Sampling Company, C. A. No. 1311.

KANSAS

Place, et al. v. Hercules Powder Co., C. A. No. 6076, Mellott, November 3, 1947.

Bennett, et al. v. Hercules Powder Co., C. A. No. 6093, Mellott, November 3, 1947.

Quincy, et al. v. Hercules Powder Co., C. A. No. 6124, Mellott, November 3, 1947.

McNealey, et al. v. Hercules Powder Co., C. A. No. 5993, Mellott, November 3, 1947.

Walker, et al. v. Hercules Powder Co., C. A. No. 6135, Mellott, November 3, 1947.

Allen, et al. v. General Motors Corporation, C. A. No. 6107, Mellott, February 24, 1948.

APPENDIX D

SUMMARY OF REPORTED AND UNREPORTED DISMISSALS BY DISTRICT COURTS OF "PORTAL-TO-PORTAL" ACTIONS UNDER SECTION 2 OF THE PORTAL-TO-PORTAL ACT

District Court	No. of Judges	Total Cases Dismissed
First Circuit		
D. Mass	1	17
Second Circuit		
W. D. N. Y.	1	6
S. D. N. Y.	6	25
N. D. N. Y.	1	1
D. Conn.	2	3
Third Circuit		
E. D. Pa.	2	2
W. D. Pa.	1	43
D. N. J.	3	29
Fourth Circuit		
D. Md.	2	2
W. D. Va.		2
Fifth Circuit		
N. D. Ga.	1	5
N. D. Tex	1	2
S. D. Tex	1	3
S. D. Ala.	1	1

District Court	No. of Judges	Total Cases Dismissed
Sixth Circuit		
E. D. Mich.	5	2
S. D. Ohio	2	14
N. D. Ohio	1	9
E. D. Tenn.	2	4
W. D. Tenn.	1	23
E. D. Ky.		1
Seventh Circuit		
N. D. Ill.	4	7
E. D. Ill.	1	2
S. D. Ind.	1	8
E. D. Wis	1	1
W. D. Wis	1	5
Eighth Circuit		
D. Minn.	2	5
S. D. Iowa	1	6
W. D. Mo.	3	8
E. D. Mo.	1	3
W. D. Ark.		1
E. D. Ark		1
Ninth Circuit		
D. Mont.	1	1
D. Idaho	1	28
D. Ore.	1	1
W. D. Wash.	1	4
E. D. Wash.	1	1
N. D. Cal.	3	6
S. D. Cal.	4	8

District Court	No. of Judges	Total Cases Dismissed
Tenth Circuit		
N. D. Okla.	1	1
E. D. Okla	1	1
D. Kans.	1	9
D. Utah		13
Total Districts	**Total Judges**	**Total Cases**
42	64	314